IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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| EUSTOLIO GONZALEZ GONZALEZ,<br><br>Petitioner,<br><br>v.<br><br>DONALD O'KEEFE,<br><br>Respondent. | No. C 12-2681 LHK (PR)<br><br>ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS; DENYING CERTIFICATE OF APPEALABILITY |

Petitioner Eustolio Gonzalez Gonzalez, a legal permanent resident of the United States who is awaiting extradition to Mexico, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. He claims that the extradition proceedings violated his right under the Speedy Trial Act. Respondent has filed an answer. Petitioner has filed a traverse. Having reviewed the briefs and the underlying record, the court concludes that petitioner is not entitled to relief, and DENIES the petition.

**PROCEDURAL HISTORY**

Petitioner first came to the United States in 1962. (Matthews Decl. ¶ 2.) He left in 1965 to return to Mexico, where he remained for almost forty years. (*Id.*) In 2004, petitioner returned to the United States, and became a legal permanent resident. (*Id.*) Unbeknownst to petitioner, on April 7, 2006, the government of Mexico issued a warrant for petitioner's arrest for the charge of attempted homicide. *In re Extradition of Gonzalez*, No. 09-70576 SBA MISC (N.D.

Cal.), Docket No. 22. Petitioner visited Mexico in 2007 and 2009 and was never informed that he had an outstanding warrant for his arrest. (Matthew Decl. ¶ 4.)

On March 5, 2009, the Mexican Government formally requested the United States to extradite petitioner to Mexico to answer to the charge of attempted homicide. *In re Extradition of Gonzalez*, No. 09-70576 SBA MISC (N.D. Cal.), Docket No. 22, Ex. 4. As a result, on June 26, 2009, the United States filed a complaint for provisional arrest of petitioner to process his extradition to Mexico. *Id.*, Docket No. 1. The case was assigned to U.S. District Judge Saundra Brown Armstrong.

It is unclear exactly when petitioner learned about the warrant for his arrest, but petitioner was arrested on September 3, 2009. *Id.*, Docket No. 16. On September 4, 2009, petitioner made his initial appearance in *In re Extradition of Gonzalez*. *Id.*, Docket No. 3. On September 15, 2009, petitioner was released on bond. *Id.*, Docket No. 12.

On November 3, 2009, petitioner filed a motion to dismiss the complaint seeking extradition based on violation of Speedy Trial Clause. *Id.*, Docket No. 19. On October 31, 2011, Judge Armstrong denied petitioner's motion. *Id.*, Docket No. 38. That same day, Judge Armstrong referred the case to Magistrate Judge Donna Ryu for all further proceedings. *Id.*, Docket No. 39. On April 10, 2012, Magistrate Judge Ryu certified that there was sufficient evidence to sustain the underlying charge and ordered extradition. *Id.*, Docket No. 53.

Petitioner filed the instant petition for writ of habeas corpus on May 24, 2012. The case was assigned to the undersigned judge.

## STANDARD OF REVIEW

An extradition may be challenged by way of a petition for writ of habeas corpus in federal court. *See Roberts v. Reilly*, 116 U.S. 80 (1885); *Prasoprat v. Benov*, 421 F.3d 1009, 1013 (9th Cir. 2005) (international extradition). In an international extradition, the district court's habeas review of an extradition order is limited to: (1) whether the extradition court had jurisdiction to conduct the proceedings as well as personal jurisdiction over the individual sought; (2) whether the extradition treaty was in force and whether the crime is an extraditable offense under the relevant treaty's terms; (3) whether there was probable cause that the

individual committed the crime; and (4) whether the crime fell within the political offense exception. *Id.*

**DISCUSSION**

Petitioner claims that the "lapse of time" between the underlying charge in 2006, and the filing of the complaint seeking extradition, in 2009, violated his right to a speedy trial as guaranteed by the Sixth Amendment. Specifically, petitioner argues that in the treaty between the United States and Mexico, Article 7 states, "Extradition shall not be granted when the prosecution or the enforcement of the penalty for the offense for which extradition has been sought has become barred by lapse of time according to the laws of the requesting or requested party." (Matthews Decl., Ex. D at 21-22.) Thus, alleges petitioner, because the United States would bar the prosecution of petitioner on the ground that the three-year delay violates petitioner's right to a speedy trial, extradition should not be granted.

Respondent argues that courts have consistently interpreted the "lapse of time" phrase to refer only to the applicable statute of limitations, and that the applicable statute of limitations has not yet been met. Further, respondent contends that the Sixth Amendment does not apply to extradition proceedings. Finally, respondent argues that petitioner has not demonstrated prejudice from any delay.

As an initial matter, Judge Armstrong's order denying petitioner's motion to dismiss the complaint in *In re Extradition of Gonzalez*, No. 09-70576 SBA MISC (N.D. Cal.), explicitly considered and rejected this claim. Although application of the law of the case doctrine is discretionary, the doctrine generally precludes a court from reconsidering an issue decided previously by the same court or by a higher court in that case. *Hall v. City of Los Angeles*, 697 F.3d 1059, 1060, 1067 (9th Cir. 2012); *Gonzalez v. Arizona*, 677 F.3d 383, 390 n.4 (2012) (en banc) ("Under the law of the case doctrine, a court will generally refuse to reconsider an issue that has already been decided by the same court or a higher court in the same case."). However, there are three exceptions to this doctrine: where "(1) the [prior] decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent

trial." *Id.* (quoting *Jeffries v. Wood*, 114 F.3d 1484, 1488-89 (9th Cir. 1997) (en banc)). Here, petitioner does not argue that any of these exceptions apply. Accordingly, the court exercises its discretion to apply the law of the case doctrine, declines to reconsider the issue which was previously rejected in *In re Extradition of Gonzalez*, No. 09-70576 SBA MISC (N.D. Cal.), and denies petitioner's petition for writ of habeas corpus.

Alternatively, even assuming without deciding that such a claim is cognizable in this habeas corpus proceeding, for the reasons stated below, the court denies the petition independently of Judge Armstrong's ruling in *In re Extradition of Gonzalez*, No. 09-70576 SBA MISC (N.D. Cal.).

Petitioner is correct that the Ninth Circuit has not addressed whether the "lapse of time" provision in the treaty between the United States and Mexico incorporates the Sixth Amendment. In fact, the court has not discovered any Court of Appeals decision to address this specific claim except for the Eleventh Circuit in *Yapp v. Reno*, 26 F.3d 1562, 1567 (11th Cir. 1994). In *Yapp*, the court expressly determined that the "lapse of time" provision in a treaty between the United States and the Bahamas referred only to a statute of limitations question and did not incorpoarte the Sixth Amendment right to speedy trial. *Id.* at 1566-68. Despite the lack of case law from any other Courts of Appeals concerning the parameters of the "lapse of time" provision, this court agrees with the district courts which have understood the "lapse of time" provision to refer only to the running of the statute of limitations rather than a speedy trial right. *See., e.g.*, *In re Flores Ortiz*, No. 10-MJ-2016 JMA, 2011 WL 3441618, *6 (S.D. Cal. Feb. 9, 2011) (finding that petitioner's argument that the "lapse of time" provision in the [United States - Mexico] Treaty incorporates the Sixth Amendment right to a speedy trial is without merit"); *United States v. Garfias*, No. CR-09-xr-90128 EMC, 2009 WL 2580641, *3 (N.D. Cal. Aug. 20, 2009) (relying on the holding in *Yapp* to conclude that the "lapse of time" provision in the United States - Mexico Treaty refers to the statute of limitations and does not incorporate a Sixth Amendment right to speedy trial); *In re Extradition of Martinez*, No. 13-mj-2042, 2014 WL 199867, *4 (M.D. Tenn. Jan. 17, 2014) (rejecting the notion that the "lapse of time" provision in the United States - Mexico Treaty incorporates the Sixth Amendment's right to a speedy trial); *cf. Sainez v.*

*Venables*, 588 F.3d 713, 716 (9th Cir. 2009) (discussing the "lapse of time" provision of Article 7 of the United States - Mexico Treaty and analyzing it as a statute of limitations claim).

In contrast, petitioner cannot support his position. Petitioner argues that the law is unsettled regarding whether a "lapse of time" incorporates a constitutional right to a speedy trial and cites to *In the Matter of the Extradition of Mylonas*, 187 F. Supp. 716, 721 (N.D. Ala. 1960), in support of his argument. However, that case has been expressly disapproved for its holding that a defendant has a Sixth Amendment right to a "speedy extradition." *Martin v. Warden, Atlanta Pen*, 993 F.2d 824, 829 n.8 (11th Cir. 1993). Thus, this court concludes that the speedy trial right is not implicated by the "lapse of time" provision.

In addition, "[t]he Sixth Amendment provides that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .'" *United States v. Marion*, 404 U.S. 307, 313 (1971). Petitioner is indeed facing a criminal prosecution once he arrives in Mexico. However, the challenged extradition proceeding is not a criminal prosecution in which petitioner is afforded constitutional procedural protections such as the right to a speedy trial. *See Martin*, 993 F.2d at 829 ("Constitutional procedural protections which by their terms are applicable only in criminal cases, however, are unavailable in extradition proceedings. Accordingly, there is no Sixth Amendment right to a speedy trial in extradition cases.").

Although the Ninth Circuit has not specifically addressed this claim, other courts agree that there is no constitutional right to a "speedy extradition" because an extradition proceeding is not equivalent to a criminal proceeding. *See, e.g.*, *Yapp*, 26 F.3d at 1565 ("We have accordingly refused, as a matter of constitutional law, to recognize any right to a speedy trial in international extradition proceedings under either the Sixth Amendment or the Due Process Clause of the Fifth Amendment."); *Martin*, 993 F.2d at 829 (concluding that there is a Sixth Amendment right to a speedy trial in criminal cases, but not in extradition cases); *McDonald v. Burrows*, 731 F.2d 294, 297 (5th Cir. 1984) (declining to apply the Sixth Amendment speedy trial right to a domestic extradition proceeding because extradition is not a criminal proceeding); *Sabatier v. Dabrowski*, 586 F.2d 866, 869 (1st Cir. 1978) (concluding that extradition proceedings are not characterized as criminal prosecutions and therefore, a speedy trial right does not attach to such

proceedings); *Jhirad v. Ferrandina*, 536 F.2d 478, 485 n.9 (2d Cir. 1976) ("We note, moreover, that the Sixth Amendment's guarantee to a speedy trial, limited by its terms to criminal prosecutions, is inapplicable to international extradition proceedings."). "Even if a treaty states that the person whose extradition is sought shall have the right to use all remedies and recourses provided by [the law of the Requested State], as does the treaty between the United States and Canada, the defendant does not have a right to a speedy extradition." *Martin*, 993 F.2d at 829 (quoting *In re Extradition of Kraiselburd*, 786 F.2d 1395, 1398 (9th Cir. 1986)); *see also Kamrin v. United States*, 725 F.2d 1225, 1228 (9th Cir. 1984) ("it has long been settled that United States due process rights [i.e., the right to speedy trial] cannot be extended extraterritorially").

Petitioner distinguishes both *Kamrin* and *Kraiselburd* because neither case evaluated whether a right to speedy trial was incorporated within a "lapse of time" provision in their treaties as opposed to a "remedies and recourses" provision. While *Kamrin* and *Kraiselburd* did not definitively address the issue of whether a speedy trial right is incorporated in a "lapse of time" provision, the court finds the reasoning in both *Kamrin* and *Kraiselburd* persuasive to support its conclusion that the lapse of time provision in the United States - Mexico treaty does not incorporate a Sixth Amendment right to a speedy trial.

In *Kamrin*, the treaty specifically permitted using only the laws of the requesting state – Australia – when considering whether the prosecution would have been barred by the lapse of time. *Kamrin*, 725 F.2d at 1227. The Ninth Circuit, in rejecting the notion that the petitioner to be extradited was entitled to other constitutional protections found in United States proceedings but not specifically agreed upon in the treaty stated, "it has long been settled that United States due process rights cannot be extended extraterritorially." *Id.* at 1228. In *Kraiselburd*, a treaty between Argentina and the United States forbade extradition if the prosecution was barred "by lapse of time" according to either the requesting or requested state. *Kraiselburd*, 786 F.2d at 1397. However, in that case, the Ninth Circuit only analyzed the "lapse of time" issue as a statute of limitations claim. Moreover, the petitioner conceded that Argentina had no obligation to act speedily in seeking extradition of a fugitive from the United States. *Id.* at 1398. Instead, the petitioner in *Kraiselburd* argued that the "remedies and recourses" provision allowed

fugitives the right to use the laws of the requested state, i.e., the United States, and thus, the provision granted petitioner the right to a speedy trial for his extradition proceeding. *Id.* The Ninth Circuit, relying upon *Kamrin*, rejected petitioner's argument and concluded that the extradition was not barred by the statute of limitations, nor did the "remedies and recourses" provision entitle petitioner to any additional protection under the United States Constitution. *Id.*

Accordingly, petitioner's petition for a writ of habeas corpus is DENIED.

**CONCLUSION**

For the reasons stated above, the petition for writ of habeas corpus is DENIED. Moreover, petitioner has not shown "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, a certificate of appealability is DENIED.

The Clerk is instructed to enter judgment in favor of respondent and close the file.

IT IS SO ORDERED.

DATED: 11/12/14

Lucy H. Koh
LUCY H. KOH
United States District Judge